

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPERIOR COURT

CHURCH
MASTER

MICHAEL J. FLYNN X
VS X
CHURCH OF SCIENTOLOGY X
OF CALIFORNIA, INC., ET AL X

NO. 54258

BEFORE: ZOBEL, J.

MOTION TO DISMISS

APPEARANCES:

DAVID BANASH, ESQUIRE, Hollingsworth Associates,
10 Union Wharf, Boston, Massachusetts 02109,
for the Plaintiff.

ERIC LIEBERMAN, ESQUIRE, Robinowitz, Boudin, Standard,
Krinsky & Lieberman, 30 East 42d. Street,
New York, New York 10017, for the Defendant.

COURTHOUSE
PEMBERTON SQUARE
BOSTON, MASSACHUSETTS
ROOM 243
OCTOBER 12, 1983

D

1 THE CLERK: Michael J. Flynn versus
2 the Church of Scientology of California. Mr. Banash
3 and Ms. Gertner.

4 THE COURT: We will have only one
5 counsel on each side argue, so why don't you make
6 whatever arrangements you want.

7 Who is for the plaintiff?

8 MR. BANASH: I am, Your Honor,
9 David Banash.

10 THE COURT: And for the defendant?

11 MR. LIEBERMAN: Eric Lieberman,
12 Your Honor.

13 MR. BANASH: I don't believe that
14 Mr. Lieberman is a member of the Massachusetts --

15 MR. LIEBERMAN: I am.

16 MR. BANASH: He is. I have no
17 objection.

18 THE COURT: Look, gentlemen, let me
19 tell you one thing and that is that counsel, if they
20 want to discuss, they can have the whole range of any
21 hallway in the courthouse, but when they are in here
22 in front of me, they talk to me and not to each other.

23 This case is plainly engendered a
24 good deal of irritated feeling between counsel, between
25 parties; but whatever your feelings, whatever your

1 irritations, you drop them when you come up in front
2 of the bench.

3 Mr. Lieberman, what's going on?

4 MR. LIEBERMAN: What, Your Honor?
5 I'm not sure what the question is. I know nothing
6 about the stenographer.

7 MR. SILVERGLATE: Oh, may we have
8 permission to have the stenographer take this,
9 Your Honor?

10 THE COURT: Why?

11 MR. SILVERGLATE: Just for a record
12 of this transcript. If Your Honor doesn't want it,
13 it's fine. We've had a record of every --

14 THE COURT: You've divined my mind
15 very well, Mr. Silverglate. Thank you.

16 MR. SILVERGLATE: Shall we send the
17 stenographer out?

18 THE COURT: She may sit here but she
19 is not to take notes.

20 MR. SILVERGLATE: Okay.

21 MR. RANKIN: Your Honor?

22 THE COURT: Yes.

23 MR. RANKIN: My name is Charles Rankin.
24 I represent a fifth defendant in the matter;
25 Mr. Lieberman represents the other four. I represent

1 the defendant Kevin Tighe. Given the papers that
2 have been filed, I suspect that Mr. Lieberman's
3 argument will cover all the points I wish to say.
4 I did want to tell Your Honor that in case there is
5 some particular interest in Mr. Tighe that has to be
6 asserted at a later point.

7 THE COURT: How does your client
8 spell his name?

9 MR. RANKIN: T-i-g-h-e.

10 THE COURT: Mr. Banash.

11 MR. BANASH: Yes, Your Honor.

12 THE COURT: Why should not the Court
13 give you a choice of three possible routes: dismissal
14 with prejudice; denial of the Motion to Dismiss; or
15 denial of the Motion to Dismiss with a Stay of the
16 Federal Court proceedings?

17 MR. BANASH: Well, I'll address them
18 in order, Your Honor.

19 Denial with prejudice --

20 THE COURT: Excuse me. I don't mean
21 to interrupt you. In the course of your discussion
22 you might wish to indicate, if you wish to, which of
23 the three is the most acceptable to you.

24 MR. BANASH: Denial with prejudice,
25 Your Honor, would severely affect our federal case.

1 We believe that the Massachusetts case law -- there
2 is some case law to the effect that it might
3 collaterally estop the plaintiff from suing in
4 Federal Court. The case law which has addressed
5 this issue, to my knowledge, has addressed the
6 vexatiousness of the Complaints and tried to assess
7 the two cases on the merits to see whether in fact
8 there is such a vexatiousness.

9 I would submit to the Court that
10 there is none in this case. The federal Complaint,
11 if the Court would examine it -- I realize that it is
12 rather lengthy -- but it is simple in this point in
13 that it only involves one defendant, and that
14 defendant is not before this Court. The defendant
15 is not a part --

16 THE COURT: He is not before this
17 Court but he is a named defendant in this case, is
18 he not?

19 MR. BANASH: He's not. He's not,
20 Your Honor.

21 THE COURT: He's not.

22 MR. BANASH: The defendant in the
23 federal case is L. Ron Hubbard, the founder and what
24 we now believe, based on discovery that has occurred
25 in other scientology litigation since the filing of

1 this Complaint, is the main perpetrator of the acts
2 which plaintiff alleges were perpetrated against him.

3 Secondly, he's the party we believe,
4 according to my client, who has the money. We believe
5 that if we were to get a judgment against these
6 defendants, the individuals of whom are basically
7 young adults, we would have no recourse to the extent
8 that Mr. Flynn is seeking. Secondly, that key fact
9 that L. Ron Hubbard is a defendant and the sole
10 defendant in the federal case and is not in this case,
11 I think makes clear the other traditional points
12 which would weigh in favor of a dismissal without
13 prejudice. And that is the comparison of the burden.
14 There is no burden on these defendants by the filing
15 of the federal claim. Matter of fact, there is not
16 prejudice against them whatsoever.

17 One of the defendants in this action,
18 Your Honor, is the Church of Scientology of Boston,
19 Inc., who is a defendant in another case in Federal
20 Court in which myself and Mr. Flynn are co-counsel:
21 Paulette Cooper versus the Church of Scientology.
22 In that case, L. Ron Hubbard is a co-defendant. In
23 that case also, since when we were unable to obtain
24 service on Mr. Hubbard, we brought a Motion for
25 Substituted Service. The Church of Scientology of

1 Boston attempted to make arguments on Mr. Hubbard's
2 behalf. It was denied standing to do so. There is
3 an order, which is attached as Exhibit 8, which is
4 the order of Judge McNaught denying the Boston
5 Church standing, stating in affect that they had no
6 legally recognized prejudice. So I would suggest to
7 the Court that effectively -- if what they are trying
8 to do is estop us in the Federal Court by arguing
9 against our Motion to Dismiss, they have no standing
10 to do so. They are not prejudiced in a legal sense
11 by the federal action. And accordingly, I would
12 suggest to the Court that that second criterion is
13 present in this case, namely: no prejudice, no undue
14 burden.

15 The defendants argue that they
16 catalogued the activity that is inferred in this case,
17 and try to argue from that that vexatiousness or
18 burden.

19 In order to answer that I refer the
20 Court to some of the other exhibits for a background
21 of this litigation. This litigation stems out of a
22 lawsuit, another lawsuit, Scientology lawsuit, filed
23 in the Federal District Court: La Venda Van Schaick
24 versus the Church of Scientology, in which one of the
25 defendants herein admitted that for a period of over

1 a year, I believe was a year and a half, he had
2 entered the condominium compound at Mr. Flynn's
3 office and removed trash from that office and various
4 other documents, segregated it out; which totaled
5 approximately 7200 different documents. Judge Garrity,
6 in that case, issued an injunction.

7 THE COURT: That's federal Garrity?

8 MR. BANASH: That's Judge Arthur
9 Garrity in Federal District Court, issued an injunction
10 against the defendant there, the Church of Scientology
11 of California, enjoining them from disseminating and
12 destroying the documents; a copy of the Restraining
13 Order is annexed in my exhibits.

14 After nine months, though, he said:
15 "It's really a tangential matter to this case.
16 Accordingly, I would suggest that you bring another
17 action -- if you want to get this injunctive relief,
18 you file another action in state court." I have the
19 memorandum of decision annexed hereto, and also a
20 transcript of the hearing in which he made those
21 statements. He gave us ten days to do so, and the
22 transcript, I believe, is -- and the catalogue of
23 the exhibits and the affidavit of Mr. Flynn. The
24 transcript is Exhibit C. And the orders of Judge
25 Garrity are Exhibits A and B.

1 We brought the action within the
2 ten days in attempting to get injunctive relief. In
3 the course of the arguments -- one of the chief
4 arguments, and the one that we primarily litigated,
5 was the irreparability of the harm if the documents
6 were destroyed. In the course of the appeal --

7 THE COURT: What has that got to do
8 with this?

9 MR. BANASH: Well --

10 THE COURT: You are giving me a
11 great deal of background of what's obviously an
12 interesting and long-running set of battles. And
13 I can tell from the papers and from what I've read
14 from the papers that this matter has gone on for
15 quite some time, and regardless of what I do it's
16 probably going to go on for some time thereafter,
17 and that's fine.

18 My question is: Why should this
19 particular lawsuit be permitted, after a considerable
20 investment of paper, to say nothing of other things,
21 be permitted mainly to die only to spring up again
22 some other time? Why shouldn't you be -- why shouldn't
23 you in fairness be required, in this particular litigation,
24 to take your pick between fighting it out here once
25 and for all or saying that you will fight no more?

1 MR. BANASH: For one very strong
2 reason, Your Honor. There is no phoenix that will
3 rise again. The issue in this case, the injunctive
4 relief, which was fought so heartily there, is not
5 an issue in the federal case.

6 THE COURT: Well, then, what's the
7 problem with denying it -- with allowing a dismissal
8 with prejudice?

9 MR. BANASH: Well, because that
10 was not the only cause of action. That's what has
11 been fought. That goes to the issue of burdensomeness.
12 It's the only issue which has been fought in this
13 litigation. In the Federal Court we are seeking
14 not only damages for that, but a wide variety and
15 a much more extensive cause of action against
16 Mr. Hubbard. A large extent of it is the, as the
17 Court senses very strongly, is to end the what we
18 claim was abusive process litigation. There are 12
19 lawsuits which have been filed against Mr. Flynn;
20 seven of which have been dismissed.

21 THE COURT: I take it that there have
22 been one or two lawsuits filed by Mr. Flynn?

23 MR. BANASH: Two. These two.

24 THE COURT: And other lawsuits filed
25 -- I seek a neutral word -- in which he has had some

1 role?

2 MR. BANASH: As counsel only.

3 THE COURT: That's what I mean.

4 MR. BANASH: He is plaintiff's counsel.

5 THE COURT: And to some extent, I
6 gather, there has been a certain amount of -- and
7 I use the verb advisedly -- soliciting of prospective
8 defendants -- plaintiffs?

9 MR. BANASH: We would heartily dispute
10 that, Your Honor.

11 THE COURT: Well, I mean, soliciting
12 doesn't have quite the nasty ring it used to 20 years
13 ago. Am I correct in my understanding that to some
14 extent Mr. Flynn has, in essence, searched for people
15 who have a complaint against Scientology?

16 MR. BANASH: I can't state that.
17 Mr. Flynn is well known for his being a plaintiff's
18 counsel. And from that La Venda Van Schaick case has
19 --

20 THE COURT: All right. In any event,
21 Mr. Flynn has an interest either as litigant,
22 defendant litigant, plaintiff or counsel in a number
23 of these cases. Do you have any idea how many of them?

24 MR. BANASH: Yes, Your Honor. Through-
25 out the country he is plaintiff's counsel and in excess,

1 I believe, of several hundred cases; co-counsel or
2 advisory in some capacity. But as far as lawsuits
3 which he has brought, there are these two.

4 THE COURT: This one and the one in
5 the Federal Court.

6 MR. BANASH: One if the Federal Court.

7 THE COURT: And the one in Federal
8 Court is just against L. Ron Hubbard, is that correct?

9 MR. BANASH: That's correct,
10 Your Honor.

11 So as to burdensomeness, since these
12 defendants are not involved, since the litigation that
13 was involved in the Federal Court -- in this court,
14 is not the subject of the federal action.

15 THE COURT: Are these defendants
16 named defendants in any other action involving
17 Mr. Flynn?

18 MR. BANASH: Not to my knowledge.

19 THE COURT: Well, if we don't dismiss
20 with prejudice, are they not subject to being sued
21 again this afternoon in some other court? Indeed, in
22 this court?

23 MR. BANASH: That's possible, Your
24 Honor, and we are prepared, for the record, to do as
25 follows: except to the extent that they sue Mr. Flynn

1 and we feel that a counterclaim is necessary for
2 some other reason; and except as they may be trustees
3 or holders of property of L. Ron Hubbard, we are
4 prepared to stipulate that they will not be defendants
5 in any suit brought by Mr. Flynn.

6 THE COURT: Mr. Lieberman, what do
7 you say to that?

8 MR. LIEBERMAN: Several things,
9 Your Honor. First of all --

10 THE COURT: First of all, is the
11 offer acceptable?

12 MR. LIEBERMAN: No, it's not.

13 THE COURT: For what reason?

14 MR. LIEBERMAN: Because these
15 defendants have a continuing interest in the resolution
16 of the dispute in the following ways:

17 First of all, Mr. Banash's statement
18 that to the extent that they may be holders of
19 Mr. Hubbard's property, what they have --

20 THE COURT: Well, now, let us not get
21 into that. The question is this. He says: allow his
22 motion and he will bind himself not to bring an action
23 against you, that is to say, not to revive this action
24 nor -- if I heard him correctly -- bring any action
25 against you. Obviously, if there is some unrelated

1 matter, then you would be free to bring -- Mr. Flynn
2 would be free to bring a claim.

3 MR. LIEBERMAN: I want to address one
4 of the exceptions that he made, though, Your Honor.
5 He said that except to the extent that we may have to
6 sue them because they are holding Mr. Hubbard's
7 property. They have alleged, not only in the
8 federal case that they have just brought, but
9 Mr. Flynn, as attorney, and Mr. Banash as attorney,
10 has alleged in numerous lawsuits throughout the
11 country, and it hasn't been just in the last-- since
12 this lawsuit was filed, that Mr. Hubbard controls
13 all churches of scientology and controls all the
14 money in the all the churches, and that they can go
15 after the church's money.

16 THE COURT: Mr. Banash, I gather
17 from what you have said that the federal action and
18 this action are to some extent related. Is that
19 correct?

20 MR. BANASH: This action is subsumed
21 within the federal action except that they are
22 different parties.

23 THE COURT: I understand that they
24 are different parties. But let me put it this way.
25 If your action against Mr. Hubbard had been brought

1 in the state Court -- in Massachusetts --

2 MR. BANASH: Yes.

3 THE COURT: I gather from what you
4 have been saying to me that the case would be good
5 candidates for consolidation at the minimum.

6 MR. BANASH: That's possible, but
7 in the Federal Court we have actions which could not
8 be brought in the State Court, Your Honor.

9 THE COURT: For example?

10 MR. BANASH: For example, violations
11 of the Racketeers Influence Corrupt Organizations
12 Act.

13 THE COURT: Does that give us civil
14 action? Does the RICO violation give civil action?

15 MR. BANASH: Yes, Your Honor. There
16 is a civil cause of action.

17 THE COURT: In what sense would a
18 violation of RICO not find a state common law analogue?

19 MR. BANASH: Well, there is -- it's
20 possible that 93(a), given the trebled damages, might
21 relate to that to some extent. But the federal cause
22 of action is based on acts, predicate acts of alleged
23 crimes that were committed by Mr. Hubbard infiltrating
24 a legitimate business -- I use that word "legitimate"
25 advisedly -- but a business, the Church of Scientology,

1 in their various entities. And that is specifically,
2 not that baggage of case law under RICO is not
3 adhered to in the Massachusetts Unfairness or
4 Deceptive Trade Practices Act.

5 THE COURT: Do you say that Mr. Hubbard
6 is subject to service of process?

7 MR. BANASH: Yes, we do, Your Honor,
8 even though he is not a resident. Our basis of service
9 is --

10 THE COURT: Well, why shouldn't we
11 then join Mr. Hubbard in this case?

12 MR. BANASH: We can't do the RICO
13 action in this court, Your Honor.

14 MR. LIEBERMAN: May I be heard on
15 that, Your Honor?

16 THE COURT: Not now.

17 MR. BANASH: Your Honor, we have no
18 interest in suing these defendants at this time. It
19 would have --

20 THE COURT: Well, if you have no
21 interest in suing them, then we can save everybody,
22 including your good selves, a good bit of time by
23 allowing the Motion with prejudice.

24 MR. BANASH: But that would affect
25 us. That may well collaterally estop us in the federal

1 case, Your Honor. And we don't feel, based on the
2 discretionary factors which I've gone over --

3 THE COURT: Yes.

4 MR. BANASH: There has been no
5 discovery in this case that has taken place, Your
6 Honor, none whatsoever. The only time that discovery
7 was started was after the federal case was filed.

8 THE COURT: I do have in front of
9 me, just by chance, on top of the pile document
10 entitled: Plaintiff's Motion to Stay Discovery
11 Until Motion to Dismiss is Heard.

12 MR. BANASH: No discovery has taken
13 place.

14 THE COURT: But is because you've
15 stopped it from taking place.

16 MR. BANASH: That's correct. One
17 week ago -- the 13th of September -- I'm sorry -- a
18 month ago, to be exact, which was one week after the
19 federal case was filed, the defendants in the state
20 case sought numerous depositions. And we felt at
21 that point that we didn't want them to incur the costs.
22 We felt --

23 THE COURT: You didn't want them to
24 incur the costs?

25 MR. BANASH: We did not want this

1 litigation to go any further. There was no point
2 in it because we did not intend to pursue it any
3 further. And accordingly, we brought that Motion.
4 The federal case, granted, has just started, but
5 the state case has only progressed since the federal
6 case has begun. There is no cost, no burden, as the
7 case law points out. The defendants of this case
8 were dismissed.

9 Secondly, the federal case --

10 THE COURT: Do sit down, Mr. Lieberman.
11 It must be tiring standing.

12 MR. BANASH: If you will, any research
13 that Mr. Silverplate has done in this case can be
14 very well used in the federal one because he's
15 representing a proposed intervenor in that case.

16 THE COURT: Any of these defendants
17 proposed interveners?

18 MR. BANASH: He's representing another
19 defendant. The proposed intervenor is the wife of
20 L. Ron Hubbard --

21 THE COURT: But nobody who is in this
22 case, our case here, is a proposed intervenor in the
23 federal case?

24 MR. BANASH: That's correct,
25 Your Honor. The state case was brought in good faith;

1 is a response to Judge Garrity's order; that litigation,
2 the injunctive relief part of that litigation having
3 ended; and the discovery against L. Ron Hubbard
4 having increased and finding in a new cause of
5 action against him, we brought the suit there.

6 I would refer the Court to two cases
7 that are cited in my brief. The one that is cited
8 on pages 10 and 11: the Puerto Rico case, and also
9 the Alamance case -- I don't have the page in my
10 brief in which it is cited, but I have a copy of the
11 case or I can give you the citation. On page 291
12 F 2d, 142. There, a similar offer was made, and
13 there was much more progress of litigation than in
14 this case. And the court allowed the dismissal with-
15 out prejudice.

16 What the defendants are trying to
17 do is very clear. What they are trying to do is defend
18 L. Ron Hubbard. There has been a judgment that they
19 have no standing to do that. We're not seeking any
20 relief against these defendants. If my stipulation --
21 my Motion is revised to make that statement which
22 I offered, no harm, no legally recognized harm can
23 accrue to these defendants; and the harm that has
24 already occurred is so minimal as to be compensable
25 by just taxable causes, if you will.

1 So, on balance, I would suggest,
2 the equities weigh in favor of allowing our Motion.

3 THE COURT: All right. Thank you,
4 very much.

5 I am persuaded from what I've heard
6 and what I have read that the interests of justice
7 require one of two things to happen: Either the
8 Motion to Dismiss be denied with prejudice or the
9 Motion be allowed with prejudice.

10 Now, it seems to me that the plaintiffs
11 are moving to dismiss, and on the basis of what I
12 have heard the defendants are saying they aren't
13 going to proceed -- the plaintiffs are saying they
14 aren't going to proceed against the defendants. So
15 it seems to me on balance that the best thing to do
16 is to allow the Motion to Dismiss with prejudice.
17 That's what I'm going to do.

18 MR. BANASH: I withdraw the Motion
19 then, Your Honor. I can't do that because we feel --

20 THE COURT: You can't withdraw the
21 Motion. You made a motion; I've acted on it. I acted
22 on it before you withdrew it. Please don't play that
23 kind of game with this Court.

24 The Motion before me is allowed
25 with prejudice.

C E R T I F I C A T E

I, Charles Janes, Certified Court Reporter,
do hereby certify that the foregoing record,
Pages 1 through 20, is a complete, accurate
and true transcription of my twin trak voice
reporting system taken in the aforementioned matter
to the best of my skill and ability.

The foregoing certification of this
transcript does not apply to any reproduction of
the same by any means unless under the direct
control and/or direction of the Certifying Reporter.


